

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVN. APPLICATION NO. 460 OF 2003

Shri Ramu Laxman Padale & anr. ... Applicants

V/s

Shri Moru Bolhu Padale & ors. ... Respondents

Mr. G.S. Godbole for the applicants.

CORAM: A.M. KHANWILKAR, J.

DATED: 28TH JULY, 2006

P.C.:

1. Heard counsel for the applicants. None appears for the respondents.

2. This application is taken up for final disposal in terms of the direction given on the earlier occasion.

3. This revision application takes exception to the judgment and order passed by the lower Court dated 29th January, 2003 below Exh.54 in Misc. Application No. 59 of 1998. By this application, the respondents - original plaintiffs prayed that, the suit which was disposed on the ground of default, be restored to the

file, to be heard and decided on merits.

4. The principal ground made out in the application and found favour with the lower Court is that the plaintiffs were not aware about the position and stage of the suit during the relevant period. In so far as that finding recorded by the lower Court, that is a sufficient cause made out by the plaintiffs for restoration of the suit. That finding is unexceptional as it is supported by the materials on record. It is not open for this Court to reappreciate the evidence and to take a different view merely because some other view is possible while exercising revisional jurisdiction. On this view, the revision application ought to fail in its entirety.

5. However, prima facie, I find force in the argument canvassed on behalf of the applicants that even if sufficient cause was made out by the respondents for restoration of the suit, the suit ought not to have been restored in so far as defendants 2, 4, 7 and 11 are concerned who were dead and the application for restoration had abated against those defendants. In fact, in the first place, it was contended that the entire application for restoration had abated. However, it is seen that such plea was not taken before the lower

Court as to whether the entire application for restoration had abated or only limited to the respondent Nos. 2, 4, 7 and 11. That plea ought to have been raised before the lower Court in first instance and findings invited of that Court. This has not happened in the present case.

6. The applicants have relied on the decision of the Apex Court in the case of **Rajendra Prasad & anr. v/s Khirodhar Mahto & ors.**, reported in 1994 Supp.(3) SCC 314 and another decision of the Division Bench in the case of **Sheela wd/o Vijay Choudhari & ors. v/s Central Bank of India & ors.**, reported in 1998 (1) Mh.L.J. 928 to contend that as the application had abated in its entirety, the suit could not have been restored. In any case, contends learned counsel for the applicants, to the extent of defendant Nos. 2, 4, 7 and 11, the application for restoration had abated.

7. This controversy will have to be answered by the lower Court in the first instance. It will be open to the parties to take such plea as may be available to them in that regard and that plea will have to be examined on its own merits. Accordingly, this revision application would partly succeed with direction to the

lower Court to consider the limited issue as to whether the restoration application abated in its entirety or to the extent of some of the Respondents. The lower Court, shall consider the said question and on recording such finding, may then proceed to pass appropriate orders as may be found proper.

9. The Trial Court shall decide the application for restoration afresh on this limited aspect for which the said application has been restored by this order. The restored application be decided expeditiously, preferably within six weeks from the receipt of order of writ of this Court.

10. Revision Application partly succeeds to the above extent with no order as to costs.

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